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Jigarlal Kantilal Doshi v Amanah Raya Bhd (administrator of the estate of Kantilal Prabhulal Doshi, deceased)

B

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–24 OF 2010(J)
ARIFIN ZAKARIA CHIEF JUSTICE, ZULKEFLI CJ (MALAYA) AND ABDUL HAMID EMBONG FCJ
C 19 OCTOBER 2011

Succession — Probate — Caveat — Grant of probate in respect of deceased's estate issued despite existence of caveat preventing any proceeding in respect of estate — Whether grant was a nullity even though problem was caused by failure of court's principal registry to keep record of entry of the caveat — Whether respondent should not have applied for grant of probate when court had only appointed it to be an administrator

D

E In the course of hearing an appeal brought by the appellant, the Court of Appeal ('COA) appointed the respondent ('ARB') as administrator of a deceased's estate. The appellant thereafter filed a caveat with the Court to prevent any party from taking any proceedings in respect of the estate without prior notice to him. Despite the caveat, ARB succeeded in obtaining a grant of F probate to the deceased's estate without the appellant's knowledge. The appellant applied to set aside the grant on the ground: (a) that the grant was a nullity when it was issued in defiance of the caveat; and (b) ARB was, in any event, only entitled, as per the COA's order, to either letters of administration ('LA') with will annexed or LA de bonis non and not a grant of probate. The G High Court dismissed the appellant's application and the decision was upheld by the COA. In its decision, the COA: (i) agreed with ARB's stand that the appellant's caveat had no effect since it was lodged after the court had appointed ARB as administrator of the estate; and (ii) held that although in form what was issued to ARB was a grant of probate, in substance it was H actually a grant of letters of administration with will annexed. The appellants were granted leave to appeal to the Federal Court against the COA's decision on the question: (1) whether ARB could petition for a grant of probate when it was appointed only as an administrator; and (2) whether the grant of probate given to ARB was a nullity when it was issued while the appellant's caveat was in I force. It transpired during the appeal hearing that the principal registry of the court did not have any record of the respondent's caveat in its index of caveats.

Held, allowing the appeal after answering leave question (1) in the negative and leave question (2) in the positive:

(1) It was not in dispute that the appellant had lodged a caveat prior to the grant of probate issued to ARB and the caveat was still in force when the grant of probate was made. A notice to the court of the appellant's right was seriously made and he could not be denied from contesting his right just because of a mistake by the court registry. A grant made in defiance of a valid caveat was a nullity and this nullity could not be affected by a mistake of the court registry. The grant should have been set aside and the matter corrected pursuant to the procedures set out under O 71 r 37 of the Rules of the High Court 1980 ('RHC') since clearly here a caveat was in existence. It would be most harsh and unfair if the appellant, who had done all he could to get the protection of the law, could not get that protection just because the principal registry had overlooked the caveat. Under O 71 r 37(b) of the RHC, the registrar at the principal registry was duty-bound to maintain an index of all caveats entered in all registries (see paras 24–27).

(2) The COA failed to appreciate the distinction between an appointment and a grant. It was the grant that clothed the personal representative with title upon its issuance by the registry under the seal of the court. The administrator derived his title from the grant and could not act until he had extracted the grant. Therefore, in the present case, a valid caveat was in force before the grant was made to ARB and to ignore the caveat was clearly wrong (see paras 17–18).

(3) The COA had appointed ARB as an 'administrator' of the deceased's estate and not as an 'executor'. Accordingly, ARB should have applied for a grant of administration and not, as it did here, for a grant of probate. The grant of probate was in breach of the COA's order and was a nullity (see paras 12–13).

[Bahasa Malaysia summary

Semasa pendengaran rayuan yang dibawa oleh perayu, Mahkamah Rayuan ('MR') melantik responden ('ARB') sebagai pentadbir estet si mati. Perayu kemudiannya memfailkan kaveat dengan mahkamah untuk menghalang mana-mana pihak daripada mengambil apa-apa prosiding berkaitan estet tanpa notis kepadanya sebelum itu. Meskipun terdapat kaveat, ARB berjaya mendapatkan pemberian probet kepada estet si mati tanpa pengetahuan perayu. Perayu memohon untuk mengenepikan pemberian tersebut atas alasan: (a) bahawa pemberian adalah batal apabila ia dikeluarkan dalam menentang kaveat; dan (b) ARB walau bagaimanapun, hanya berhak, seperti perintah MR, kepada sama ada surat pentadbiran ('SP') dengan wasiat dilampirkan atau de bonis non SP dan bukan pemberian probet. Mahkamah Tinggi menolak permohonan perayu dan keputusan adalah disahkan oleh MR. Dalam keputusannya, MR: (i) bersetuju dengan pendirian ARB bahawa kaveat perayu tidak menjejaskan memandangkan ia dimasukkan selepas mahkamah telah melantik ARB sebagai pentadbir estet; dan (ii) memutuskan bahawa

walaupun dalam borang apa yang dikeluarkan kepada ARB adalah pemberian probet, pada amnya ia adalah sebenarnya pemberian surat pentadbiran bersama wasiat dilampirkan. Perayu-perayu dibenarkan izin untuk merayu kepada Mahkamah Persekutuan terhadap keputusan MR atas soalan: (1) sama ada ARB boleh mempetisyen untuk pemberian probet apabila ia hanya dilantik sebagai pentadbir; dan (2) sama ada pemberian probet yang diberikan kepada ARB adalah batal apabila ia dikeluarkan semasa kaveat perayu berkuat kuasa. Ia berlaku semasa rayuan pendengaran bahawa Pendaftaran Utama Mahkamah tidak mempunyai apa-apa rekod mengenai kaveat responden dalam indeks kaveatnya.

Diputuskan, membenarkan rayuan selepas menjawab soalan izin (1) dalam negatif and soalan izin (2) dalam positif:

(1) Ia tidak dipertikaikan bahawa perayu telah memasukkan kaveat sebelum pemberian probet dikeluarkan kepada ARB dan kaveat tersebut masih berkuat kuasa semasa pemberian probet dibuat. Notis kepada mahkamah mengenai hak perayu dibuat secara serius dan dia tidak boleh dinafikan daripada mempertikaikan haknya hanya kerana kesilapan oleh pejabat pendaftaran mahkamah. Pemberian dibuat dalam menentang kaveat yang sah adalah batal dan pembatalan ini tidak dapat dijejaskan atas kesilapan pejabat pendaftaran mahkamah. Pemberian sepatutnya diketepikan dan perkara tersebut dibetulkan berikutan kepada prosedur-prosedur yang ditetapkan di bawah A 71 k 37 Kaedah-Kaedah Mahkamah Tingggi 1980 ('KMT') memandangkan di sini dengan jelas kaveat adalah wujud. Ia akan menjadi terlalu teruk dan tidak adil jika perayu, yang telah melakukan kesemua yang dia boleh lakukan untuk mendapatkan perlindungan undang-undang, tidak dapat perlindungan tersebut hanya kerana pendaftaran utama telah terlepas pandang kaveat tersebut. Di bawah A 71 k 37(b) KMT, pendaftar di pendaftaran utama adalah wajib untuk mengekalkan indeks kesemua kaveat yang dimasukkan ke dalam semua pendaftaran (lihat perenggan 24–27).

(2) MR gagal untuk menilai perbezaan di antara pelantikan dan pemberian. Ia adalah pemberian yang memberikan wakil peribadi dengan hakmilik atas pengeluarannya oleh pendaftaran di bawah meterai mahkamah. Pentadbir memperolehi hakmiliknya daripada pemberian dan tidak boleh bertindak ke atasnya sehingga dia telah mengekstrak pemberian tersebut. Oleh itu, dalam kes ini, kaveat sah adalah berkuat kuasa sebelum pemberian dibuat kepada ARB dan untuk tidak mempedulikan kaveat adalah jelas salah (lihat perenggan 17–18).

(3) MR telah melantik ARB sebagai 'administrator' estet si mati dan bukan sebagai 'executor'. Dengan itu, ARB patut memohon untuk pemberian pentadbiran dan bukan, seperti yang ia lakukan di sini, untuk pemberian

probet. Pemberian probet melanggar perintah MR dan adalah batal (lihat perenggan 12–13).] A

Notes

For cases on probate in general, see 11(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2890–2974. B

Cases referred to

Aly & Another v Aly & Another [1983] Lexis Citation 984; (1984) 128 Sol Jo 65, CA (refd) C
Clarke and others v Chadburn and others [1985] 1 All ER 211, ChD (refd)
Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors [1998] 4 MLJ 268, CA (refd)
Kok Song Kong v BSP Co Sdn Bhd [1988] 2 MLJ 440, CA (folld)
Lachmi Narain Etc v Union Of India & Ors 1976 AIR 714, SC (folld) D
Letterstedt v Broers and another [1881-85] All ER Rep 882; [1884] 9 AC 371, PC (refd)
Moran v Place [1896] P 214, CA (refd)
P Govindasamy Pillay & Sons Ltd v Lok Seng Chai & Ors [1961] 1 MLJ 89 (folld) E
SMKR Meyappa Chetty v SN Supramanian Chetty [1916] 1 AC 603, PC (refd)

Legislation referred to

Probate and Administration Act 1959 ss 16, 33, 34, 60
Public Trust Corporation Act 1995 ss 13(1), 14(2) F
Rules of the High Court 1980 O 71 r 37, 37(6), (7)

Cyrus Das (Jeremy Lee and Roy Vallipuram with him) (Roy & Assoc) for the appellant.
SC Loh (Mark Lau & Kelvin Seet with him) (Sreenevasan Young) for the respondent. G
Damayanti (Tilaklal and Jogesh Doshi with him) (Khabir Dhillon) watching brief for the respondent.

Abdull Hamid Embong FCJ: H

[1] The background to this appeal is best understood by the following chronology of events which spanned over 20 years:

1 July 1991	Kantilal Prabhulal Doshi ('the deceased') died leaving a will in which his wife, Damayanti Kantilal Doshi, and his youngest son, Jogesh Kantilal Doshi (Jogesh) were named as executrix and executor respectively of the deceased's estate ('the then executrix and executor'). I

17 August 1991	The then executrix and executor then instituted Johor Bahru High Court Suit No 22–195 of 1991 ('Suit No 195') against the appellant, his wife and Overseas Industries Sdn Bhd (a company which was formed by the deceased in 1969) for inter alia a declaration that the appellant holds 1,475 shares in the said company in trust for the estate.
15 October 1991	Probate was granted in favour of the then executrix and executor.
17 September 1994	The appellant, his wife and Overseas Industries Sdn Bhd filed a notice of motion for an order that the grant of probate granted by the High Court to the then executrix and executor be revoked.
29 July 1995	The High Court allowed the above-mentioned application and ordered that the official administrator be appointed to administer the estate of the deceased.
	The then executrix and executor appealed against that order of the High Court.
4 June 1998	The Court of Appeal affirmed the order of the High Court and the respondent (ARB) was duly appointed as the administrator of the estate pursuant to the Public Trust Corporation Act 1995.
	(Meanwhile, several writs of summons and originating summonses as well as originating petitions had been filed by the parties mainly regarding the issues of directorial positions and the holding of shares in Overseas Industries Sdn Bhd.
	By 28 February 2006, all the cases were consolidated and were ordered to be tried together with Suit No 195.)
1 November 2007	A notice of caveat was entered by the appellant against the estate of the deceased via Probate No 30 of 2007.
4 January 2008	A grant of probate was issued to ARB.
	(The appellant contended that the issuance of the said grant of probate was made without any notice given to the appellant.)

5 February 2008	The appellant filed an Originating Summons No 24–384 of 2008 in the High Court to have the appointment of the ARB as administrator of the estate revoked and a private trust company be appointed in the ARB's place to complete the administration of the estate.
19 March 2008	The appellant filed a summons in chambers (encl 194) seeking to strike out the Suit No 195 on the ground that the ARB had no locus standi to maintain the suit as the ARB had neither applied for nor extracted the grant of letters of administration to the estate.
27 March 2008	The ARB filed an affidavit in reply stating that they had, on 4 January 2008, extracted the grant of probate for the deceased's estate.
31 March 2008	The appellant withdrew his application in Originating Summons No 24–384 of 2008 for the revocation of the appointment of the ARB as administrator of the deceased's estate. On the same day, the appellant's summons in chambers (encl 194) was struck out by consent. It was also ordered that 'the appellant shall withdraw all the outstanding interlocutory applications in the consolidated actions' to pave the way for the Suit No 195 and the consolidated actions to be heard.
24 June 2008	The appellant filed an Originating Summons No 24–1970 of 2008 (the present action) applying for an order that the grant of probate dated 4 January 2008 to the ARB be set aside on the ground that the said probate was wrongfully and unlawfully issued for the following reasons: (a) there was in existence a caveat entered by the appellant on 1 November 2007 on the estate; and (b) in any case the ARB was only entitled to letters of administration with will annexed and/or letters of administration de bonis non and not a grant of probate.
3 November 2008	The appellant's application was dismissed by the High Court.
20 November 2009	The appellant filed a notice of appeal to the Court of Appeal.
25 August 2010	The appellant's appeal was dismissed by the Court of Appeal.

24 September 2010	The appellant filed a notice of motion to the Federal Court for leave to appeal against the decision of the Court of Appeal, essentially challenging the validity of the Grant of Probate to ARB on 4 January 2008 on the same two grounds.
9 December 2010	Leave to appeal was allowed by the Federal Court on the following questions of law: (a) whether the ARB could petition for grant of probate under the Public Trust Corporation Act 1995 when appointed only as an administrator? and (b) whether a grant of probate is a nullity when a caveat against a grant was in force?

THE FIRST QUESTION

[2] The starting point in answering this question must be s 13(1) of the Public Trust Corporation Act 1995, the law that relates to the ARB and regulates the exercise of its functions and powers. And the subsection states:

> 13 Grant of probate and letters of administration to corporation.
>
> (1) The Corporation may, on its own application or on the application of any other person, be granted probates of will or letters of administration by the Court.

In short, ARB may either be appointed an executor or an administrator of the estate. This distinction is important because unlike the wide powers of an executor, an administrator may only deal in the property of the deceased subject to the directions and permission of the court as laid out in s 60 of the Probate and Administration Act 1959.

[3] The order of the Court of Appeal dated 4 June 1998 had affirmed the High Court order of 29 July 1995 in appointing the ARB as an administrator of the estate. The appellant here had in that case applied for the revocation of the probate granted to the then executrix and executor and in place to appoint the official administrator as an administrator with the will annexed. The Court of Appeal revoked the appointments of the then executrix and executor on the ground that the High Court had been right in finding that there was a sufficient cause under s 34 of the Probate and Administration Act 1959 to revoke their appointments. At the High Court four of the seven complaints by the appellant were found to have been proven as sufficient cause, namely the non extraction of the grant of probate, the non ascertainment of the debts of the estate and of the residue available for distribution, the failure of the executors to render accounts and lastly the failure to take steps to prevent dissipation of the assets (the reported judgment of the Court of Appeal is at *Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors* [1998] 4 MLJ 268).

[4] There had been great friction and hostility between the then executrix and executor and the appellant resulting in various court actions but as correctly observed by the Court of Appeal, relying on a passage of Lord Blackburn in *Letterstedt v Broers and another* [1881-85] All ER Rep 882; [1884] 9 AC 371, that factor should not 'itself (be) a reason for the removal of a trustees (of a trust estate)'. In spite of the strong objection by the then executrix and executor, the Court of Appeal proceeded to appoint the ARB as the administrator of the estate, in their place.

[5] The ARB however did not implement its appointment or to seek for a transfer of the estate from the then executrix and executor to itself as allowed under s 14(2) of the Public Trust Corporation Act 1995 which states:

> (2) Any executor who has obtained probate or any administrator who has obtained letters of administration or any trustee may, with the sanction of the Court and after giving such notice to the persons beneficially interested as the Court may direct, and notwithstanding that he has acted in the administration of the deceased's estate of the trust property, transfer such estate or trust property to the Corporation for administration either solely or jointly with the continuing executors, administrators or trustees, if any.
>
> (3) The order of the Court sanctioning such transfer shall, subject to this Act, give to the Corporation all the powers of the executor, administrator or trustee.

[6] Instead, after ten years of inaction the ARB on 4 January 2008 applied to the court to obtain a grant of probate over the estate.

[7] That grant is now reproduced. It states:

> DALAM MAHKAMAH TINGGI MALAYA DI JOHOR BAHRU GERAN PROBET NO: 32–194–2007
>
> DALAM HARTA PUSAKA
>
> KANTILAL PRABHULAL DOSHI, SIMATI NO KP: 7307548
>
> GERAN PROBET
>
> KETAHUILAH bahawa pada tarikh yang tertulis di bawah ini Wasiat dan Testamin Terakhir oleh Mendiang Kantilal Prabhulal Doshi, si mati yang telah mati pada 1hb Julai, 1991 dengan meninggalkan harta yang terletak di dalam bidang kuasa Mahkamah ini, telah dibuktikan di hadapan ini, dan bahawa Pentadbiran bagi semua dan tiap-tiap satu harta alih dan tak alih simati yang terletak dalam bidang kuasa itu telah diberikan oleh Mahkamah ini kepada AMANAH RAYA BERHAD (344986-V) sebagai Pentadbir yang diberikan oleh Mahkamah Tinggi di Johor Bahru melalui Usul Pemula No 25–32–1994 bertarikh 29.07.1995 dan disahkan oleh Perintah Mahkamah Rayuan Sivil No J-02–584 Tahun 1995 bertarikh 4.6.1998 yang menggugurkan Damayanti Kantilal Doshi dan Jogesh Kantilal Doshi sebagai wasi dan melantik Amanah Raya Berhad sebagai Pentadbir Amanah Raya Berhad setelah mengangkat sumpah untuk mentadbirkannya dengan sempurna dan jujur dengan membayar hutang-hutang simati yang patut dan

A legasi-legasi yang terkandung dalam Wasiatnya dan memberi keterangan yang adil dan benar tentangnya pada bila-bila masa dikehendaki mengikut undang-undang.

Bertarikh 04hb Januari, 2008

...

B Abdul Ghapar bin Ab Latif TimbalanPendaftar Mahkamah Tinggi

Johor Bahru

Tarikh Keluaran 1 Feb, 2008

C **[8]** For the appellant, it was argued that this grant of probate was itself a wrong application. The ARB should instead have applied for a grant of letters of administration since the Court of Appeal had appointed it only as an administrator not an executor, as seen from that part of the order which reads 'Dan adalah diperintahkan selanjutnya bahawa Amanah Raya Berhad dilantik sebagai Pentadbir Pusaka bagi mendiang Kantilal Prabahulal Doshi'. Learned D counsel for the appellant also submitted that the ARB, being who it is, should know the difference between their entitlements to a grant of letters of administration instead of a grant of probate.

E **[9]** Learned counsel for the respondent submitted that the substance rather than form of the grant of probate should be looked at to determine if a probate was actually granted. The Court of Appeal agreed with this approach when it made a finding that since the respondent was appointed as an administrator, 'it cannot be said that there had in fact actually been a grant of probate to the F respondent'. The Court of Appeal found that in substance the grant of probate was actually a grant of letters of administration with a will annexed; pursuant to the order of the High Court dated 29 July 1995, made under s 16 of the Probate and Administration Act 1959.

G **[10]** The Court of Appeal made the following findings on this issue:

> What is patently clear from the 'Geran Probet' is that other than the case number and the heading/title, nowhere in the body of the 'Geran' is the appointment of the respondent as an executor mentioned. On the contrary, the 'Geran' makes it clear that it is granted pursuant to the High Court order as affirmed by the Court of H Appeal, appointing the respondent as 'Pentadbir' or administrator. In the circumstances, it cannot be said that there had in fact been a grant of probate to the respondent.

[11] With respect we have to depart from this reasoning of the Court of I Appeal. In our view, the application for the grant of probate was made by the ARB acting pursuant to its powers under s 13(1) of the Public Trust Corporation Act. This may be discerned from para 5 of its affidavit supporting the petition. It states:

> 5. Pempetisyen memfailkan permohonan berasaskan Usul Pemula No 25–32–1994

bertarikh 29 Julai, 1995 yang dikeluarkan oleh Mahkamah Tinggi Malaya di Johor Bahru dan Perintah Mahkamah Rayuan Rayuan Sivil No: J-02–584 Tahun 1995 bertarikh 4hb Jun, 1998, dan permohonan ini dibuat menurut Seksyen 13, Akta Perbadanan Amanah Raya 1995.

[12] The Court of Appeal had on 4 June 1998 appointed ARB as an administrator. The ARB should have applied for a grant of administration instead, and not as it did here for a grant of probate.

[13] As such we are in agreement with the submission of the appellant that the grant of probate in this instance had been in breach of the order of the Court of Appeal and would declare that grant to be a nullity. An act done in disobedience of a court order as happened here, is an invalid act; and it could not affect any change in the rights and liabilities of others (see *Clarke and others v Chadburn and others* [1985] 1 All ER 211). It is also trite that any order made by a court of unlimited jurisdiction has to be obeyed by a person against whom it was made unless it had been set aside.

In concluding that 'other than the case number, nowhere in the body of the 'Geran' is the appointment of the respondent as an executor mentioned', the Court of Appeal seemingly missed two important factors in coming to its conclusion. First, the application by ARB is a specific application for a Grant of Probate entitled 'Petisyen untuk Geran Probet No 32–194 Tahun 2007' and secondly as shown above, the grant itself is duly headed 'Geran Probet'. To us, in this instance, the clear intent and form cannot be ignored.

[14] We are therefore unable to agree with the Court of Appeal in its finding that the grant was substantially a grant of letters of administration with will annexed since the respondent was named therein as a pentadbir or administrator. It should be recalled that the ARB's initial appointment as an administrator by the High Court was pursuant to an application by the appellant to revoke the appointment of the then executrix and executor pursuant to s 34 of the Probate and Administration Act 1959.

THE SECOND QUESTION

[15] The appellant had entered a caveat on 1 November 2007. The grant of probate made on 4 January 2008 was thus, made during the existence of the caveat. It was submitted by appellant's counsel that since there was no notice to the caveator, it was thus in defiance of the caveat and so would make that grant a nullity.

[16] The respondent's counsel conversely argued that when the caveat was lodged in November 2007, the ARB had already been appointed as an administrator by order of the High Court dated 29 July 1995 and affirmed by

A the Court of Appeal on 4 June 1998. The lodging of the caveat on 1 November 2007 was thus far too late to have any legal effect. It was further submitted that the caveat had no effect because, firstly, in a letter from the principal registry dated 12 December 2007, to the registrar of the court at Johor Bahru in connection with ARB's application for a grant of probate, no mention was B made of that caveat, and secondly, by letter dated 1 December 2010 the principal registry confirmed that there was no record of the respondent's caveat in the index of caveats. The Court of Appeal in its judgment had agreed with the respondent's stand that the caveat lodged was too late and thus 'akin to shutting the stable doors after the horse has bolted'. We disagree. Our answer C to this argument appears later in this judgment.

[17] With respect, we are in agreement with the submission of the appellant that the Court of Appeal had failed to appreciate the distinction between an appointment and a grant. It is the grant that clothes the personal representative D with a title upon its issue by the registry under the seal of court. The administrator derives his title from the grant and cannot act until then. We agree with what Ismail Khan J said in *P Govindasamy Pillay & Sons Ltd v Lok Seng Chai & Ors* [1961] 1 MLJ 89 that 'it is only on extracting the grant of letters of administration that the petitioner can be said to be duly clothed with E the representative character and to have acquired a title to the estate'. The learned judge in that case also followed Lord Parker's observation in the case of *SMKR Meyappa Chetty v SN Supramanian Chetty* [1916] 1 AC 603, that:

> An administrator on the other hand derives title solely under his grant and cannot, therefore, institute an action as administrator before he gets his grant. The law on F the point is well settled.

[18] The correct position is that a valid caveat was in force before the grant and to ignore the caveat was clearly wrong.

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[19] The legal effect of a caveat is actually a notice to the court not to allow proceedings to be taken without notice to the caveator, and not merely as a notice to the caveator as was wrongly held by the Court of Appeal. *Tristram and Coote's Probate Practice* (21st Ed) defines a caveat as 'a notice in writing lodged H in the principal probate registry, or in a district probate registry, that *no grant is to be sealed* in the estate of the deceased named therein without notice to the party who has entered the caveat'. (Emphasis added).

[20] A caveat is thus not merely a notice to a particular person; it is a general I notice to the court not to allow proceedings to be taken without notice to the caveator.

[21] This absolute bar on any proceedings in the face of the caveat is emphasised by O 71 r 37(7) of the Rules of the High Court 1980 ('the RHC')

which in peremptory language states that 'The Registrar must not make any grant if he has knowledge of an effective caveat in respect thereof'. The qualification 'must' in that rule is in our view even stronger than a 'shall' stipulation. The Indian Supreme Court in *Lachmi Narain Etc v Union Of India & Ors* 1976 AIR 714 had said so in this passage which we now adopt:

> If the legislative intent is expressed clearly and strongly in imperative words, such as the use of 'must' instead of 'shall', that will itself be sufficient to hold the provision to be mandatory, and it will not be necessary to pursue the enquiry further.

[22] Section 33 of the Probate and Administration Act 1959 also declares that 'no representation shall be granted without notice to the caveator and after entry of any such caveat no representation shall be made until the caveator has been given opportunity to contest the right of any petitioner to representation'.

[23] Long ago in *Moran v Place* [1896] P 214 (Court of Appeal, Probate Division) proclaimed this legal effect of a caveat in this passage from the judgment of Lindley J:

> A caveat is not a notice to any opponent in particular. It is a notice to the registrar or officer of the court not to let anything be done by anybody in the matter of the will, or the goods of the deceased, without notice to the person who lodges the caveat.

[24] From the above principles and statements we would therefore hold that a grant made in defiance of a caveat would be a nullity. And in answer to the respondents' argument, we say that this nullity will not be affected even by a mistake of the court registry. As observed by Eveleigh LJ in *Aly & Another v Aly & Another* [1983] Lexis Citation 984; (1984) 128 Sol Jo 65:

> it did not make sense that the defendant, who had done everything required of him by the rule, should be penalised for something not done in time by the court.

And in *Kok Song Kong v BSP Co Sdn Bhd* [1988] 2 MLJ 440, by Godfrey J, with whom we agree, said that:

> Where the rights of a party are threatened by an act or default of an officer of the court, the court clearly has such a power to correct the matter.

[25] It would be most harsh and unfair if the appellant, who had done all he could to get the protection of the law, is unable to obtain that protection just because the principal registry overlooked the caveat. We need also mention that under O 71 r 37(6) of the RHC the registrar at the principal registry is duty bound to maintain an index of all caveats entered in all registries.

[26] It was not in dispute that the appellant did lodge a caveat on 1 November 2007 ie, prior to the grant of probate made to ARB on 4 January

A 2008. It was still in force at the latter date. A notice to the court of his right has thus been seriously made. Why should he be now deprived to contest his right by a mistake of the court registry?

B **[27]** In our view the grant here should have been set aside and the matter corrected pursuant to the procedures set out under order O 71 r 37 of the RHC since clearly here a caveat was in existence.

C **[28]** For these reasons, the answer to question 1 is in the negative and to question 2 is in the affirmative. The appeal is therefore allowed with costs.

Order accordingly.

Reported by Ashok Kumar

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